

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
CORTY VAN DYK & SONS DAIRY,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB No. 80-148

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal from the assessment of a \$2000 civil penalty for the alleged violation of RCW 90.48.080, came before the Pollution Control Hearings Board, Marianne Craft Norton, and David Akana (presiding), at a formal hearing on December 16, 1980, in Lacey.

Appellant was represented by his attorney, Bryce H. Dille; respondent was represented by Jeffrey D. Goltz, assistant attorney general. Olympia court reporter Kim Otis recorded the proceeding.

Having heard the testimony, having examined the exhibits, and having considered the contentions of the parties, the Board makes these

1 FINDINGS OF FACT

2 I

3 On April 22, 1980, from its dairy farm near Sumner, Washington,
4 appellant Corty Van Dyk & Sons Dairy discharged a substantial quantity
5 of green-brown color, foamy, odorous liquid believed to be dairy
6 wastes into Fennel Creek, a public water of the state. Samples taken
7 showed high fecal coliform count in Fennel Creek because of the
8 discharge through one of appellant's ditches connected to a holding
9 tank. The source of discharge was the holding tank which had
10 overflowed. It is possible that an irrigation slurry line crossing
11 Fennel Creek, which had separated could have contributed to the
12 discharge observed below the dairy.

13 II

14 On April 23, 1980, respondent conducted a damage assessment to
15 Fennel Creek as a result of the water pollution on April 22 and
16 determined a resource loss of salmonoid population at 100 percent.
17 Damages totaling \$1,883.10 for such loss was assessed upon and paid by
18 appellant. Damage to other species of fish and other organisms
19 occurred but was not calculated or assessed on appellant. The
20 assessment report noted sphaerotilus growth downstream from the
21 discharge point but not upstream. Such growth indicates the presence
22 of polluted water over a period of time.

23 III

24 While conducting the damage assessment on April 23, 1980, further
25 discharge of dairy waste into Fennel Creek were seen by respondent's
26 inspector from appellant's waste-irrigated area lying east of the
27 creek which had become saturated.

Residue from dairy wastes were observed in some of appellant's other ditches connected to the creek on April 22 and 30. At the time of the observations, no liquid was seen flowing into the creek.

IV

Appellant's operation has been the subject matter of a series of complaints and violations since 1969, some of which resulted in penalties. Since the last penalty in 1975 respondent's inspectors visited the area at least 15 times and noted no violations.

V

For the April 22, 1980 discharge, appellant was assessed a \$2000 civil penalty which was appealed to this Board.

VI

Appellant's owner, who was not at the dairy on April 22, 1980, surmised that the irrigation slurry line crossing Fennel Creek must have burst because of an airlock thereby causing the discharge. After being assessed the instant penalty, appellant took steps to improve drainage on the fields with the assistance of the U.S. Soil Conservation Service (SCS) at a cost of \$23,500. Future improvements will bring the cost to \$53,000. Appellant will receive about \$13,000 in grants from the SCS over a period of years and derive some economic benefits from the improvements. The primary purpose of the improvements are pollution control oriented, however. By improving drainage on the dairy, appellant expects to avoid liquid runoff from the fields after liquid manure has been sprayed on it.

VII

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings the Board comes to these

CONCLUSIONS OF LAW

I

Appellant discharged a matter which is a pollutant within the meaning of RCW 90.48.020.¹

II

Appellant unlawfully discharged a pollutant into public waters in violation of RCW 90.48.080² and for which a civil penalty was

1. RCW 90.48.020 provides in part:

Whenever the word "pollution" is used in this chapter, it shall be construed to mean such contamination, or other alteration of the physical, chemical or biological properties, of any waters of the state, including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to the public health, safety or welfare, . . . or to livestock, wild animals, birds, fish or other wildlife.

2. RCW 90.48.080 provides:

It shall be unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, run, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of the commission, as provided for in this chapter.

1 properly assessed under RCW 90.48.144.³ Appellant does not contest
2 the violation but does assert that the \$2000 penalty is excessive.
3 Respondent, on the other hand, asserts that the penalty is reasonable
4 in amount given the circumstances of the discharge and the past record
5 of the appellant.

6 III

7 Pursuant to RCW 90.48.144, when an appeal is filed, the "penalty
8 shall become due and payable only upon completion of all review
9 proceedings and the issuance of a final order confirming the penalty
10 in whole or in part." Board review of civil penalties, including the
11 amount, is provided by statute to provide adequate procedural
12 safeguards against administrative agency arbitrariness. See Yakima
13 Clean Air Authority v. Glascam Builders, Inc., 85 Wn.2d 255 (1975).
14 One consideration in reviewing the amount of the penalty is to adjust
15 the same to accomplish the purpose of the act enunciated in
16
17
18

19 3. RCW 90.48.144 provides in part:

20 "Every person who:

21 . . .

22 (3) Violates the provisions of RCW 90.48.080, shall
23 incur, in addition to any other penalty as provided
24 by law, a penalty in an amount of up to five thousand
25 dollars a day for every such violation.

1 RCW 90.48.010.⁴ This policy includes maintaining the highest
2 possible standards to insure the purity of state waters, and the
3 propagation and protection of fish and other aquatic life. The
4 penalty, although resulting from the first observed violation in
5 nearly five years, was apparently the reason appellant sought to
6 employ methods to prevent and control pollution of state waters from
7 field runoff. It prompted appellant to take the initial steps to
8 control pollution from his property.

9 The \$2000 civil penalty is reasonable in amount in view of the
10 purpose of the act and should be affirmed. However, considering the
11 circumstances of the violation, appellant's past record, and the
12 present commitment of appellant to control pollution, payment of half
13 of the fine should be suspended provided that there be no violations
14 of ch. 90.48.RCW for a period of two years.

15 IV

16 Any Finding of Fact which should be deemed a Conclusion of Law is
17 hereby adopted as such.

18 From these Conclusions the Board enters this

19
20 4. RCW 90.48.010 provides in part:

21 It is declared to be the public policy of the state
22 of Washington to maintain the highest possible
23 standards to insure the purity of all waters of the
24 state consistent with public health and public
25 enjoyment thereof, the propagation and protection of
26 wild life, birds, game, fish and other aquatic life,
and the industrial development of the state, and to
that end require the use of all known available and
reasonable methods by industries and others to
prevent and control the pollution of the waters of
the state of Washington.

ORDER

The \$2000 civil penalty assessed by the Department of Ecology (DE 80-337) upon Corty Van Dyk & Sons Dairy is affirmed, provided however, that \$1000 of the penalty is suspended on condition that appellant not violate ch. 90.48 RCW for a period of two years after the date of this order.

DONE this 2nd day of January, 1981.

POLLUTION CONTROL HEARINGS BOARD

David Akana

DAVID AKANA, Member

Marianne Craft Norton

MARIANNE CRAFT NORTON, Member

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FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER